

IN THE
Supreme Court of the United States
October Term, 1975

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

BANGOR PUNTA CORPORATION, NICOLAS M. SALGO
AND DAVID W. WALLACE,
Petitioners,

v.

CHRIS-CRAFT INDUSTRIES, INC., *et al.*,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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**PETITION FOR A WRIT OF CERTIORARI
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Petitioners, Bangor Punta Corporation, Nicolas M. Salgo and David W. Wallace, Defendants-Appellees below, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on April 11, 1975.

Opinions Below

The opinion of the District Court for the Southern District of New York on the issue of liability is reported at 337 F.Supp. 1128 and is reproduced at pp. A-125-162 of the Joint Appendices.* The opinion of the Court of Appeals on

* The opinions below are reproduced in a separate volume of Joint Appendices A through E submitted with this Petition and the petitions of other defendants, and "A", "B", "C", "D" and "E" page references are to that volume.

the issue of liability (A-1-124) is reported at 480 F.2d 341 (*"Chris-Craft II"*). The opinion of the District Court on relief (B-43-80) is reported at 384 F.Supp. 507. The opinion of the Court of Appeals on relief (B-1-42) is reported at 516 F.2d 172 (*"Chris-Craft III"*).

Prior opinions of the District Court (C-32-48) and the Court of Appeals (C-1-31) relating to an application for a preliminary injunction are reported at 303 F.Supp. 191 and 426 F.2d 569 (*"Chris-Craft I"*), respectively. The opinions of the District Court in the connected cases of *SEC v. Bangor Punta Corporation* (D-1-21) and *Bangor Punta Corporation v. Chris-Craft Industries, Inc.* (D-22-34) are reported at 331 F.Supp. 1154 and 337 F.Supp. 1147, respectively.

Jurisdiction

The judgment of the Court of Appeals was entered on April 11, 1975 (E-1-2), and a timely petition for rehearing was denied on June 9, 1975 (E-3, E-6). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Questions Presented

This case presents the following important questions concerning the existence and nature of an implied cause of action for damages, in favor of one aspirant in a corporate takeover contest against another, under Sections 10(b) and 14(e) of the Securities Exchange Act of 1934 (*"1934 Act"*):

1. Is there an implied private cause of action for damages—

(a) under Section 10(b) of the 1934 Act and Rule 10b-6 thereunder, where plaintiff neither bought nor sold the securities involved in the alleged violation,
or

(b) under Section 14(e) of the 1934 Act, on account of an omission from a prospectus for an exchange offer neither directed to plaintiff nor accepted by it?

2. If there are such implied causes of action, may a plaintiff recover damages from defendants who acted in good faith and in reasonable reliance upon expert advisers, without intent to mislead or other form of scienter?

3. If there are such implied causes of action, may a Court of Appeals impose damages by establishing presumptions of reliance and of injury despite findings by the District Court, left undisturbed on appeal, that there was no evidence of reliance and that plaintiff was not injured in fact?

4. If there are such implied causes of action, what is the proper measure of damages in favor of a losing aspirant in a corporate takeover contest?

5. May a Court of Appeals, instead of remanding for a further hearing, use excerpts from a record created for the purpose of determining damages under one measure of recovery to determine damages under a different measure of recovery, thereby increasing damages from \$1.7 million to \$25.8 million, and increasing prejudgment interest from \$600,000 to nearly \$10 million?

Statutes and Regulations Involved

Section 10(b) of the 1934 Act, 15 U.S.C. § 78j(b), Section 14(e) of the 1934 Act, 15 U.S.C. § 78n(e), Section 28(a) of the 1934 Act, 15 U.S.C. § 78bb(a), Section 11 of the Securities Act of 1933 ("1933 Act"), 15 U.S.C. § 77k, and Rule 10b-6 under the 1934 Act, 17 C.F.R. § 240.10b-6, are set forth in an Appendix to this Petition.

Statement of the Case

A. Preliminary Statement

This case arises out of a contest for control of Piper Aircraft Corporation ("Piper"). The "winner," Bangor Punta Corporation ("BPC"), a publicly held company, has been held liable—jointly and severally with two of its directors, three members of the Piper family and Piper's financial adviser—to pay the "loser," Chris-Craft Industries, Inc. ("CCI"), which still owns 43% of Piper, nearly \$36 million (including prejudgment interest). The judgment is the largest amount ever awarded in a case arising under the federal securities laws. It is substantially more than the current market value of BPC's common stock or CCI's common stock and is approximately equal to the entire shareholders' equity in Piper.

This massive judgment brings into sharp focus issues related to those this Court considered only last Term in *Blue Chip Stamps v. Manor Drug Stores*, 95 S.Ct. 1917 (1975), *Cort v. Ash*, 95 S.Ct. 2080 (1975), and *Rondeau v. Mosinee Paper Corp.*, 95 S.Ct. 2069 (1975), concerning the scope of implied rights of action for money damages under federal statutes such as the anti-fraud provisions of the 1934 Act. The Court of Appeals here, in its zeal to be certain that BPC's two technical violations of the federal securities laws would be severely punished, eliminated every traditional legal requirement that stood in its path:

First, it implied a private right of action for damages under Section 10(b) and Rule 10b-6 in favor of a plaintiff who neither purchased nor sold the security involved, contravening the doctrine this Court later upheld in *Blue Chip Stamps*.

Second, it implied a private right of action for damages under Section 14(e) on account of an omission in a prospectus, in favor of a plaintiff who did not

acquire the securities covered by the prospectus and was not a member of the class intended to be protected by Section 14(e), contravening well-established principles reaffirmed only last Term in *Cort*.

Third, it nullified the trial court's finding that BPC and its directors acted in good faith by effectively abolishing any requirement of scienter in private damage actions. Compare *Ernst & Ernst v. Hochfelder*, 503 F.2d 1100 (7th Cir. 1974), *cert. granted*, 95 S.Ct. 1557 (1975).

Fourth, it held that any violation of the securities laws is to be presumed to have caused an actual injury, and on this basis disregarded the trial court's finding that there was no such causal nexus. Compare *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), with *Rondeau*.

Fifth, disregarding express statutory limitations on damages and its own previous definition of the injury the plaintiff suffered, it awarded massive damages wholly unrelated to any injury BPC or its directors could have caused. See Section 28(a) of the 1934 Act.

Finally, it calculated such damages itself, without remand, by selecting isolated testimony ~~not credited~~ by the trial court. It then "affirmed" the District Court's grant of prejudgment interest, though the amount of damages and thus interest had been increased fifteen-fold.

One result of these rulings is to impose a crushing penalty on the former shareholders of the target corporation who accepted BPC's exchange offer and now hold BPC shares—the very class that the statutes involved were explicitly designed to protect. Another result is to give CCI—the loser in a vigorous battle for control in which, as all courts have agreed, BPC and its directors acted in good

faith—vastly more than CCI would now have if it had won instead of lost the contest. An award of this sort will inevitably discourage competitive tender offers, a result Congress plainly did not intend.

B. Facts

CCI began purchasing Piper stock in December 1968 and made a cash tender offer for 300,000 Piper shares in January 1969. Piper's management opposed CCI's tender offer, but CCI achieved its goal. By the end of April, having made additional cash purchases, CCI owned 34% of Piper's outstanding shares. See Table on p. 8, Items 1-3.*

BPC did not purchase any Piper shares until May 1969. Piper's investment adviser, The First Boston Corporation ("First Boston"), had invited BPC to seek control of Piper, and, on May 8, BPC purchased the shares held by individual members of the Piper family (about 31% of all the Piper shares). A few days later BPC bought an additional 7% of the Piper shares for cash in private, off-exchange transactions from three large investors. After the purchase of this 7%, which the Court of Appeals later held violated Rule 10b-6, BPC had a slim 4% lead over CCI with almost 30% of the Piper shares still in public hands. Table, Items 4 and 5.

Two months later, in July, BPC offered to exchange its securities for the remaining Piper shares, and CCI made a competing exchange offer. As a result of these offers, BPC and CCI each acquired an additional 7% of Piper, and BPC held a narrow 4% lead, with 15% of the stock still in the hands of public shareholders. Table, Items 6-8. BPC was later held to have violated Section 14(e) during its exchange offer; this is the second of the two violations on which the Court of Appeals based its massive judgment.

* The contest for control of Piper is summarized in the Table on page 8.

At the conclusion of the competing exchange offers, neither aspirant had control of Piper. The District Court specifically found that, as late as August 19, 1969, control was available to either BPC or CCI, and accordingly denied CCI's request for preliminary injunctive relief against future purchases by BPC, saying:

"Neither party has gained control of Piper, and both are still in a position to do so." (C-47)

The Court of Appeals *en banc* affirmed this conclusion in *Chris-Craft I* and went on to say that in mid-August 1969 CCI was not at any real disadvantage in the contest:

"... we conclude that the district court did not err in refusing to enjoin the continued solicitation of stock by Bangor Punta. At that time Chris-Craft was free to compete equally with Bangor Punta for the remaining Piper shares, and it did so. We do not understand Chris-Craft to allege that prior misdeeds of Bangor Punta so determined the course of the competition for shares after the date of the decision below that Chris-Craft was placed at any real disadvantage." (C-9)

Although control was still available to either side after the competing exchange offers ended—approximately 243,000 Piper shares were in the hands of the public—CCI purchased only 29,200 more shares and then stopped making purchases and voluntarily "withdrew from the battle" owning 42% of Piper's stock. (B-7) BPC purchased over 100,000 additional shares, reaching a total of 51% on September 5, 1969. Table, Items 9 and 10. All of these purchases by BPC were made at a time when control was still available to both aspirants, and all were wholly lawful. These lawful purchases gave BPC a majority interest, an event subsequently held to have done a \$36 million injury to CCI.

SUMMARY OF THE CONTEST FOR CONTROL

Total Piper Shares Outstanding ----- 1,644,790

| Acquisition of Piper Shares | | | | | Cumulative Percentage of Piper Shares Owned | | |
|---|-------------------------|----------------------|------------------|---------------|--|-------|--------|
| Buyer | Type of Acquisition | Dates | No. of Shares | % of Total | CCI | BPC | Public |
| 1. CCI | cash purchases | 12/30/68- 1/22/69 | 203,700 | 12.4% | 12.4% | 0% | 87.6% |
| 2. CCI | cash tender offer | 1/23/69- 2/ 3/69 | 304,606 | 18.5% | 30.9% | 0% | 69.1% |
| 3. CCI | cash purchases | 1/23/69- 4/ 7/69 | 47,900 | 2.9% | 33.8% | 0% | 66.2% |
| [MAY 8: BPC ENTERED CONTEST] | | | | | | | |
| 4. BPC | sale by Piper family | 5/ 8/69 | 501,090 | 30.5% | 33.8% | 30.5% | 35.7% |
| 5. BPC | cash purchases | 5/14/69- 5/23/69 | 120,200 | 7.3% | 33.8% | 37.8% | 28.4% |
| [MAY 22: THIS LITIGATION BEGAN] | | | | | | | |
| 6. CCI | exchange offer | 5/15/69- 7/24/69 | 110,802 | 6.7% | WITHDRAWN | | |
| 7. BPC | exchange offer | 7/18/69- 7/29/69 | | | 33.8% | 44.5% | 21.7% |
| 8. CCI | exchange offer | 7/24/69- 8/ 4/69 | | | 40.6% | 44.5% | 14.9% |
| 9. CCI | cash purchases | 8/12/69- 8/18/69 | | | 42.4% | 44.5% | 13.1% |
| [AUGUST 19: PRELIMINARY INJUNCTION DENIED; CCI "WITHDREW FROM THE BATTLE"] | | | | | | | |
| 10. BPC | cash purchases | 8/ 8/69- 9/ 5/69 | 100,614 | 6.1% | 42.4% | 50.6% | 7.0% |

C. Litigation

This action was commenced on May 22, 1969.* In its first amended complaint, CCI alleged principally that BPC's private purchases of 120,200 Piper shares in May 1969 violated Rule 10b-6, which prohibits a person participating in the distribution of a security from acquiring that security or any right to acquire that security. The District Court held that Rule 10b-6 did not apply to those transactions.**

In *Chris-Craft I*, the majority of the Court of Appeals, over the strong dissent of Chief Judge Lumbard, disagreed. It held that purchases of a target company's stock by the maker of an exchange offer for that stock constituted purchases of rights to acquire the maker's own stock, in violation of Rule 10b-6. The case was remanded to the District Court.***

* Jurisdiction of the District Court was invoked under 28 U.S.C. § 1331(a), Section 27 of the 1934 Act, 15 U.S.C. § 78aa, and Section 22 of the 1933 Act, 15 U.S.C. § 77v.

** CCI's theory was that BPC, having announced its intention to offer BPC securities in exchange for Piper shares, was engaged in the distribution of BPC securities; that Piper stock represented a right to acquire BPC securities in the exchange offer itself; and that BPC was therefore prohibited by Rule 10b-6 from purchasing Piper stock. District Judge Tenney ruled that the purpose behind Rule 10b-6—preventing the artificial stimulation of the market in the shares being distributed—would not be served by applying the Rule in this situation. (C-45) Here, purchases of Piper shares by BPC could have the effect, if any, only of making BPC's exchange offer less attractive by increasing the price of Piper stock—obviously not what BPC wanted to do. Chief Judge Lumbard subsequently pointed out that BPC "did not then know of any rule or interpretation precluding the transactions." (C-22)

*** CCI also alleged in its first amended complaint that the press release issued by Piper and BPC on May 8, 1969, which included the statement that BPC intended to offer "Bangor Punta securities to be valued in the judgment of The First Boston Corporation at not less than \$80 per Piper share," violated Section 5(c) of the 1933 Act, 15 U.S.C. § 77e(c), by going beyond Rule 135, 17 C.F.R. § 230.135, which specifies the information that may be published before the filing of a registration statement. Since the statement was entirely accurate, the Court of Appeals, like the District Court, found that CCI had not been damaged by the release. (A-42-43) This issue is no longer involved in this case.

CCI then filed a second amended complaint, adding the charge that the prospectus for BPC's July 1969 exchange offer had failed to disclose an alleged agreement to sell BPC's investment in the Bangor and Aroostook Railroad ("BAR"). CCI claimed that because of this alleged omission, the prospectus violated Section 14(e) of the 1934 Act. Shortly thereafter, the Securities and Exchange Commission ("SEC") brought an action against BPC making the same allegation and seeking an injunction requiring BPC to offer rescission to the former Piper shareholders who had exchanged their shares, plus a general injunction against future securities law violations.

The CCI and SEC actions were tried together. The evidence established that, while BPC had by July received a proposal to dispose of its investment in the BAR, there was no agreement to sell. (D-11-12) The evidence further established that counsel for BPC and First Boston, together with BPC's independent accountants, had reviewed the status of the BAR with BPC and First Boston executives. These experts had unanimously advised BPC that because the discussions of a possible sale or other dispositions of the BAR were in a preliminary stage and the legal, accounting and tax implications had not been explored or considered by the BPC Board of Directors, disclosure of possible dispositions and the implications of each was not required and could prove misleading.* (D-6-12)

In the SEC case, the District Court ruled that there was no concealed agreement to sell the BAR. However, the Court held as well that, although BPC "did not intentionally or purposefully mislead" the recipients of the prospectus, the offer of \$5 million for BPC's interest in the BAR made the carrying value of \$18.4 million on BPC's balance sheet "obsolete." (D-14) It therefore ordered BPC to offer to rescind all of its acquisitions of Piper stock pur-

* BPC's interest in the BAR was later sold to Amoskeag Corp. on October 2, 1969 for \$5 million. (D-3)

suant to the exchange offer. However, the Court denied the requested injunction against future violations because it found *no* "bad faith" or propensity to violate the securities laws on the part of BPC. (D-14, 17)

In CCI's case, the District Court, after trial, dismissed the complaint. It held that the Rule 10b-6 violation was a technical one, which had not misled anyone and had not injured CCI. (A-149, 151) With respect to the Section 14(e) claim, the District Court repeated the conclusion it had reached in the SEC case: the prospectus was "unintentionally in error." (A-143) The District Court also held that the offer of rescission required in the SEC case was the only appropriate remedy for this unintentional error, since CCI was unable to show any causal nexus between the alleged violations and its claimed injury. (A-144-146)

On appeal (*Chris-Craft II*), the Court of Appeals reversed and remanded, holding that CCI had standing to sue for damages under Rule 10b-6 and Section 14(e). The Court of Appeals acknowledged that the defendants' violations were technical and not made in bad faith. (A-37, 47, 97-100, 117-123) It also acknowledged that there was no evidence that CCI could ever have gained control of Piper, even if the defendants had not violated the law. (A-56, 66) Nevertheless, the Court of Appeals held that the violations would be presumed to have injured CCI by denying it a fair opportunity to compete for control. (A-60)

The Court of Appeals then directed the District Court to issue an injunction barring BPC from voting either bloc of Piper shares for five years so that BPC would (as it does today) have the power to vote only 37% of the shares against CCI's 42%. In addition to this injunction and the rescission offer that had already been ordered in the SEC case, the Court of Appeals directed that damages be awarded to CCI, measured by

"the reduction in the appraisal value of CCI's Piper holdings attributable to BPC's taking a majority posi-

tion and reducing CCI to a minority position, and thus being able to compel a merger at any time.” (A-69)

On remand,* the District Court heard testimony and received evidence on the “reduction in the appraisal value” of CCI’s Piper shares attributable to BPC’s acquiring control. It held that CCI was to be compensated for the loss of its opportunity to compete for control of Piper as of September 5, 1969 when, if the shares BPC acquired in the challenged transactions are ignored, CCI would have had a hypothetical 42% to 37% lead. After analyzing the factors that give value to control in this situation, the District Court “generously valued” this opportunity premium at five percent of the intrinsic value of the Piper stock, or \$2.40 per share. This calculation produced a damage award of \$1,673,988. (B-70) In addition, the District Court awarded prejudgment interest, which totaled \$599,011. (B-79)

On appeal (*Chris-Craft III*), the Court of Appeals deemed this judgment for more than \$2 million “quite insubstantial,” and took the following steps to enlarge it:

1. Discarding the damage formula it had enunciated in *Chris-Craft II*, the Court of Appeals held that the measure of damages was the difference between the historical cost to CCI of all its Piper shares and the price at which CCI could theoretically have sold the stock after BPC acquired control. It did so despite the facts that (a) CCI had acquired almost 80% of its holdings before BPC entered the contest; (b) neither BPC nor its directors had

* On July 20, 1973, petitioners BPC, Salgo and Wallace petitioned this Court for a writ of certiorari to review the decision of the Court of Appeals in *Chris-Craft II*. Certiorari was denied, 414 U.S. 910 (1973). That denial, of course, does not prevent this Court from reaching the issues raised in this petition. See, e.g., *Mercer v. Theriot*, 377 U.S. 152, 153 (1964); Stern & Gressman, *Supreme Court Practice* § 2.2 at 27 (4th ed. 1969). Petitioners have preserved these issues throughout the course of the litigation. See, e.g., *Chris-Craft III* at B-40, n. 30.

misled CCI or encouraged it in any way to purchase any shares; and (c) CCI would have suffered precisely the same decline in the market value of its Piper shares had it obtained the control it allegedly was unfairly denied.

2. The Court of Appeals then decided that it would itself determine damages without a remand, and did so on the basis of selected portions of the testimony and report of one CCI expert witness—a witness whose testimony and report were discredited by the trial judge and whose opinion, like that of the other experts, was premised on the formula enunciated in *Chris-Craft II*. On the basis of those excerpts, the Court of Appeals then directed that judgment be entered against all defendants, jointly and severally, for \$25,793,365. (B-21-32)

3. The Court of Appeals also “affirmed” the District Court’s decision to award prejudgment interest on the ground that this was a matter “within the equitable discretion of the district court to be exercised according to considerations of fairness.” (B-32-33) Because of the redetermination of damages, however, this “affirmance” increased the actual interest award from \$599,011 to approximately \$10,000,000.

Reasons for Granting the Writ

This already well known case involves a series of rulings that will greatly broaden the scope and consequences of implied private damage actions under the 1934 Act, and thus increase the burdens on the federal judiciary. These rulings will also effectively discourage future corporate takeover contests, a result contrary to the express intent of Congress.

Petitioners do not ask this Court to review the decision that it unintentionally committed two technical

securities law violations in the midst of a hard-fought contest for corporate control. Petitioners believe that the decisions below on these points are wrong and that their actions, all of which were taken after careful consultation with counsel, were lawful. Petitioners recognize, however, that this aspect of the case is not of sufficient general importance to warrant review.

Instead, Petitioners bring to this Court important and recurring issues of wide application involving the creation of implied private rights of action for damages, scienter, causation, measure of damages and due process of law. Each of these issues is important to the lower federal courts, the business community and the investing public.

Taken together, the erroneous rulings below eliminate every traditional element of an implied cause of action for damages under the anti-fraud provisions of the 1934 Act, except proof of the violation itself. One inevitable result will be to discourage tender offers and takeover contests, which frequently create substantial benefits for the target company's shareholders. This will in turn defeat an objective recognized by Congress in adopting the Williams Act, which added Section 14(e) to the 1934 Act, that takeover bids "should not be discouraged." S. Rep. No. 550, 90th Cong., 1st Sess. at 3 (1967); H.R. Rep. No. 1711, 90th Cong., 2nd Sess. at 4 (1968). This congressional intention was expressly noted by this Court only last Term in *Rondeau*, 95 S.Ct. at 2076.

In *Electronic Specialty Co. v. International Controls Corp.*, 409 F.2d 937, 948 (2d Cir. 1969), Judge Friendly observed:

"Probably there will no more be a perfect tender offer than a perfect trial. Congress intended to assure basic honesty and fair dealing, not to impose an unrealistic requirement of laboratory conditions that might make the new statute a potent tool for incumbent manage-

ment to protect its own interests against the desires and welfare of the stockholders.”

If there can be no “perfect tender offer,” then even the most prudent offeror risks making technical and good faith violations of the sort found below. Yet under the Court of Appeals’ decision, such an offeror must insure his opponent against all losses, even if unrelated to the offeror’s actions. If such a result is to be the consequence of good faith mistakes inevitable in a takeover contest, then tender offers and takeover contests will be seriously discouraged. Surely this Court will wish to decide whether this result, which “Congress expressly disclaimed,” *Rondeau*, 95 S.Ct. at 2076, is to be judicially proclaimed.

A. The Decision That One Aspirant in a Corporate Takeover Contest Has Implied Causes of Action for Damages Against Another Aspirant Under Section 10(b) and Section 14(e) Conflicts with the Principles Underlying *Blue Chip Stamps* and *Cort* and This Court’s Earlier Decision in *Texas & Pacific Ry. v. Rigsby*.

The Court of Appeals created two new *implied* rights of action for money damages under the federal securities laws. First, in contravention of the principles underlying this Court’s later decision in *Blue Chip Stamps*, the Court of Appeals held that a non-purchaser of securities has a private right of action for damages under Section 10(b) of the 1934 Act and Rule 10b-6 thereunder. Second, disregarding the principles set forth in *Texas & Pacific Ry. v. Rigsby*, 241 U.S. 33 (1916), and reaffirmed only last Term in *Cort*, the Court of Appeals held that one tender offeror has a private right of action for damages against another under Section 14(e), even though tender offerors are not within the “especial class” that Section 14(e) was enacted to protect.

Before turning to these points, we note that the SEC has just taken a position before this Court that, if adopted,

would preclude implying private damage remedies in favor of CCI under either Section 10(b) or Section 14(e). In its Brief as Amicus Curiae at 8-9 in *Ernst & Ernst v. Hochfelder*, cert. granted, 95 S.Ct. 1557 (1975) (No. 74-1042), the SEC said:

“... the limitations upon damage liability that Congress imposed in those sections of the federal securities laws that expressly provide for private damage suits for violations of those laws constitute an appropriate guideline for the courts in determining the scope of the implied action under Rule 10b-5.

“These express civil remedies permit a plaintiff to recover for negligent conduct only in circumstances where (i) the defendant knew or could reasonably foresee that the *plaintiff* would rely on his conduct, (ii) the *plaintiff* did in fact so rely, and (iii) the amount of the plaintiff's damages caused by the defendant's conduct was definite and ascertainable. The same limitations should be applied to damage actions under Rule 10b-5 where the defendant's conduct was negligent.” (Emphasis added.)

None of these three tests is met here. CCI was not expected to rely, and did not in fact rely, on any conduct of BPC, Salgo or Wallace. Moreover, CCI's damages were, as is more fully described in Point D below, neither “caused by the defendant” nor “definite and ascertainable.” While the SEC's brief in *Hochfelder* specifically concerned standing to seek damages for violations of Rule 10b-5, its position is equally applicable to Rule 10b-6, which is based on the same section of the same statute, and to Section 14(e), which embodies the same principles and much of the same language as Rule 10b-5.*

* Nor is there any reason why the position the SEC has taken with respect to conduct characterized as “negligent” should not be equally applicable to the conduct of BPC and its directors, which all courts characterized as “in good faith” or “unintentionally in error.” (A-37, 47, 97-100, 117-123, 143; D-14)

1. SECTION 10(b)

Rule 10b-6 applies to every distribution of securities. It prohibits a corporation that is distributing securities from simultaneously purchasing either those securities or rights to buy them. The purpose of the Rule is to prevent price manipulation during the distribution. BPC was engaged in a distribution of BPC securities in exchange for Piper stock in July 1969. Its off-exchange, private purchases of Piper stock from three institutions during the previous May were held to violate Rule 10b-6.

CCI neither purchased nor sold any BPC securities. The Court of Appeals nevertheless held that CCI could bring an implied cause of action for damages against BPC under Section 10(b) of the 1934 Act and Rule 10b-6 thereunder.

This holding contravenes the principle this Court declared in *Blue Chip Stamps*, upholding the doctrine of *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2d Cir. 1952), *cert. denied*, 343 U.S. 956 (1952). This Court held in *Blue Chip Stamps* that the phrase "in connection with the purchase or sale of any security" in Section 10(b) limits private causes of action for damages to actual purchasers or sellers of the securities involved.

The Court of Appeals specifically recognized that the phrase "in connection with the purchase or sale of any security" would, if applicable, bar CCI from pursuing its claim. However, it simply ignored the statutory language and held that CCI could bring an implied action under Rule 10b-6 because Rule 10b-6 does not repeat the statutory "in connection with" language, while Rule 10b-5 does. (A-65, n. 29)

The distinction is groundless, because both rules derive their authority from Section 10(b) of the 1934 Act, which does contain the limiting phrase. That Rule 10b-6 does

not repeat the statutory phrase is irrelevant, for the rule cannot enlarge upon the statute. *Miller v. United States*, 294 U.S. 435 (1935). Were the law otherwise, as the Court of Appeals here thought, then the SEC could itself reverse *Blue Chip Stamps* by amending Rule 10b-5 to exclude the statutory phrase.

2. SECTION 14(e)

The Court of Appeals also created a new private cause of action for damages under Section 14(e) of the 1934 Act, which is designed to protect the shareholders of a target corporation by requiring aspirants for control to disclose material information to them. Disregarding the principle that a right of action may be implied from a statute only in favor of the class for whose benefit the legislation was enacted, the Court of Appeals held that Section 14(e) implied a private right of action for damages on behalf of an unsuccessful tender offeror. The result was to convert legislation designed as a shield for target shareholders into a sword that, as here, can result in collecting huge damages at the expense of members of the very class Congress sought to protect.

Section 14(e) was added to the 1934 Act by the Williams Act, the sole purpose of which was to protect shareholders of the target company. S. Rep. No. 550, 90th Cong., 1st Sess. (1967); H.R. Rep. No. 1711, 90th Cong., 2nd Sess. (1968). This Court specifically recognized the congressional intent in *Rondeau*, when it stated, 95 S.Ct. at 2075-76:

“The purpose of the Williams Act is to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information regarding the qualifications and intentions of the offering party.”

CCI is not a member of the class Congress intended to protect. The congressional purpose was to protect target

company shareholders confronted with a tender offer who must decide, on the basis of information that the offeror supplies or fails to supply, whether to tender their shares. CCI made no such decision. It did not accept BPC's exchange offer or, as the District Court specifically found (A-143), otherwise rely on BPC's prospectus. Nor does it seek damages on the basis of a failure to accept the BPC offer.

In creating from a statute enacted to protect one class an implied private right of action for a wholly different class, the Court of Appeals disregarded established principles, recently reaffirmed by this Court, that limit the judicial creation of rights of action in the face of congressional silence. In *Rigsby*, this Court held that rights of action could be implied from federal statutes only in favor of "the class for whose especial benefit the statute was enacted," 241 U.S. at 33. And only last Term in *Cort*, this Court listed the first question to be answered in determining whether a private right of action could be implied from a statute as follows, 95 S.Ct. at 2087-88:

"... is the plaintiff 'one of the class for whose especial benefit the statute was enacted,' *Texas & Pacific Ry. v. Rigsby*, 241 U.S. 33, 39 ... (1916) (emphasis supplied)—that is, does the statute create a federal right in favor of the plaintiff?"

Each judge on the panel that decided *Chris-Craft II* had a different reason for ignoring these principles. Judge Timbers thought that he should "not infer from the silence of the statute that Congress intended to deny a federal remedy and to extinguish liability which, under established principles of [state] tort law, normally attend the doing of a proscribed act." (A-30) But, of course, the fact that the remedy for the act complained of has traditionally been sought in the state courts based on state law argues against, not for, implying a federal remedy from a federal statute

designed to protect a different class of persons. See *Cort*, 95 S.Ct. at 2088. Judge Mansfield stated that CCI had "standing solely on the ground that vigorous enforcement of the anti-fraud provisions through private litigation . . . calls for . . . implication of a private right of action in favor of a defeated contestant against the successful bidder for control. . . ." (A-102-103) But this rationale as the sole justification for implying a private right of action was rejected in *Blue Chip Stamps*, 95 S.Ct. at 1923, 1931-32. Moreover, the target shareholders, the protected class, are quite capable of bringing class actions to enforce their own rights, and these actions provide a significant supplement to SEC enforcement proceedings. Cf. *Rondeau*, 95 S.Ct. at 2077, n. 10. Finally, Judge Gurfein concurred on the ground that since BPC needed the 7% it acquired in the exchange offer to achieve control, CCI had standing. (A-95) His theory would require a remedy to be implied in favor of any person who could allege injury, however indirect, whether or not the plaintiff was a member of the class to be protected. This rationale too was rejected in *Blue Chip Stamps*, 95 S. Ct. at 1926-27, and is contrary to the doctrine of *Rigsby* and *Cort*.

This Court in *Blue Chip Stamps*, *Rondeau* and *Cort* has reaffirmed that there are limits, founded on long-standing public policy and the judiciary's respect for the legislative powers of the Congress, to the authority of the federal courts to create new federal remedies for every perceived wrong. The SEC's amicus brief in *Hochfelder* agrees. The Court of Appeals' decision here to create two new federal causes of action marches in just the opposite direction and deserves this Court's review.

B. This Case Presents an Important Additional Aspect of the Scienter Issue Now Before This Court in the *Hochfelder* Case.

By granting a writ of certiorari in the *Hochfelder* case, this Court has recognized the importance of settling the widespread confusion between and within the Circuits with

respect to the degree of culpability necessary to establish liability for damages under the anti-fraud provisions of the 1934 Act.

The instant case, like *Hochfelder*, involves the fundamental question of whether a defendant may be held liable for money damages under the anti-fraud provisions of the 1934 Act in the absence of bad faith or intent to deceive. The *Hochfelder* case presents the issue in the context of a negligent failure to discover material facts. This case presents the issue in the context of an advertent business decision made in good faith and in reasonable reliance upon the unanimous opinion of expert legal and accounting advisers. Thus, the scienter issue presented by this case is one of even greater significance to the business community than the negligence question involved in *Hochfelder* because of the continuous need of business planners to base their decisions upon the professional advice of responsible experts.

Indeed, the most extraordinary feature of this extraordinary case is that massive and punitive damages were awarded despite the repeated findings by the District Court, echoed by the Court of Appeals, that BPC and its directors had acted in good faith and without intent to defraud or mislead. The District Court held that because BPC had received and was analyzing a proposal to purchase its BAR investment for less than the amount at which it was carried on BPC's financial statements, BPC should have disclosed in the prospectus for its exchange offer that such carrying value was "obsolete." (D-14) BPC's independent accountants as well as counsel for both BPC and First Boston knew of the purchase proposal. These experts had advised BPC and First Boston that because the discussions of a possible sale of the BAR were at a very preliminary stage and the legal, accounting and tax implications had not been explored or considered by the BPC Board of Directors, any reference to any possible disposition was not required by the securities laws and could prove misleading. Relying

upon this professional advice, BPC said nothing in its prospectus about the proposal it had received.

Based upon this evidence, the District Court held that CCI had failed to establish any "form of scienter" to support its claim for damages under Section 14(e) (A-144), finding as fact that the prospectus "was unintentionally in error" (A-143), and that:

"... Bangor Punta did not intentionally or purposefully mislead Piper Aircraft stockholders or the public or investors by the omission to make disclosure of the sale under consideration nor did Bangor Punta or its directors intend to gain an advantage over Chris-Craft by the nondisclosure in the contest being waged for control. There was no purposeful connection between the nondisclosure and the contest for control of Piper. In other words, the nondisclosure was not prompted by an improper purpose." (D-14)

On appeal, all three judges agreed with the District Court's findings of fact as to BPC's and its directors' good faith and lack of intent to deceive.* (A-37, 47, 97-98, 117-123)

* Judge Timbers recognized that BPC's failure to describe the possible disposition of the BAR was not done "in bad faith" (A-47); at one point he referred to BPC's action as "negligence." (A-56) While at another point Judge Timbers said that BPC and its directors "showed reckless disregard for the importance of their activities concerning the BAR" (A-48), this was contrary to the findings of the District Court. Both Judge Mansfield and Judge Gurfein recognized that BPC acted in good faith. (A-97-100, 117-123) Judge Mansfield specifically noted:

"[Judge Timbers'] characterization ignores the fact that under generally accepted accounting principles 'stated book value' may properly be used in a financial statement and is not viewed in the financial world as the equivalent of market value. A person able to read a balance sheet would probably have recognized that such 'historical' cost did not necessarily represent current liquidating value. Furthermore, to write down the figure immediately to \$5 million might have been treated by the SEC as speculative and possibly misleading, in view of the other forms of disposition of BAR that were still under consideration." (A-122-123)

But the Court of Appeals then formulated a scienter test that circumvented these findings. It held that when a defendant knows a fact omitted from a prospectus, and a court later determines that such fact is material, nothing more need be shown. Scienter has been established, even though the defendant omitted the fact in the good faith belief—in reasonable reliance on expert advice—that the fact was not material and that disclosure was not required.

This test does not merely alter the scienter requirement, it eliminates it. Judge Friendly recognized this in *Gerstle v. Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1301, n. 20 (2d Cir. 1973), where he stated that the *Chris-Craft II* scienter test “would result in virtually absolute liability” where the defendant is a corporation.*

The Court of Appeals did not apply this test to BPC only, but to BPC’s two directors as well. It also deprived them of the “due diligence” defense Congress granted to them in Section 11(b)(3)(A) of the 1933 Act. Under that section, which provides an express cause of action for omissions in prospectuses, these individuals could have avoided liability by establishing that “after reasonable investigation” they had “reasonable ground to believe and did believe . . . that there was no omission to state a material fact required to be stated” in the prospectus.

* Mr. Justice Goldberg, in *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 193 (1963), pointed out that in an implied cause of action for damages under the federal securities laws, an “intention to defraud or to misrepresent” was a well established element of proof. Similarly, in *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 866-68 (2d Cir. 1968) (*en banc*), *cert. denied sub nom. Coates v. SEC*, 394 U.S. 976 (1969), Judge Friendly, concurring, sharply drew the line between the propriety of granting injunctive relief under Rule 10b-5 in the absence of proof of scienter, which he condoned, and the suggestion that scienter could be dispensed with in private damage actions, which he condemned.

When they act in good faith, companies and their officers and directors must be able to rely on expert professional advice. For the Court of Appeals to impose liability in such circumstances under statutes directed at “fraud” and “manipulative or deceptive devices” was a grievous error.*

C. The Court of Appeals Wrongly Interpreted This Court's Decisions in the *Mills* and *Ute* Cases to Create Irrebuttable Presumptions of Reliance and Causation of Injury, an Interpretation That Will Greatly Expand the Volume of Securities Litigation in the Federal Courts.

CCI sought damages for interference with its opportunity to compete for control of Piper. CCI never proved, however, that BPC's missteps deprived it of control or its opportunity to gain control. The District Court found, and the Court of Appeals agreed, that CCI did “not establish a nexus between the violations it charges and the damages it claims to have suffered” (A-147) and that CCI failed to establish “a reasonable probability that its defeat and damages were connected with the claimed violations.” (A-145) And the Court of Appeals *en banc* in *Chris-Craft I* recognized that as of August 19, 1969—after both of BPC's alleged missteps—control was still available to either CCI or BPC. (C-9)

The Court of Appeals in *Chris-Craft II* ignored all this, however, and linked BPC's two missteps to CCI's injury by means of presumptions it derived—quite wrongly—

*This case also raises the question whether the same scienter requirements applicable in actions based on Rule 10b-5, like *Hochfelder*, are applicable in actions based on Rule 10b-6. Because Rule 10b-6 has wide application, this too is a question worthy of this Court's attention. There was no finding here by any court that BPC or its directors acted with intent to mislead or with any other form of scienter in making the purchases later held, in the first reported administrative or judicial application of the Rule in this situation, to have violated Rule 10b-6.

from two decisions of this Court, *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), and *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972). This expansion of *Mills* and *Ute*, if allowed to stand, will encourage additional litigation in the federal courts by permitting plaintiffs to recover vast sums by merely showing a technical violation of the securities laws, without proof that the violation caused any injury at all.

The Court of Appeals held that *Mills* and *Ute* required it to "presume that the Piper shareholders would not have accepted the BPC exchange offer but for the misrepresentations" concerning the BAR. (A-60) This holding alone raises serious questions, for it extends *Mills* and *Ute* to a plaintiff who has not himself relied on the misrepresentations and to whom the prospectus was not directed. The District Court did full justice to *Mills* and *Ute* when it ordered BPC to offer rescission to the Piper shareholders who exchanged their shares.

The Court of Appeals then went on to make an even more serious mistake, holding that *Mills* and *Ute* also required it to presume that BPC's violations actually injured CCI. This was wholly wrong. This Court in *Mills* carefully distinguished between a presumption of reliance, which it sanctioned, and a presumption of causation of injury, which it held plaintiff would still have to prove. Mr. Justice Harlan, writing in *Mills* for the Court, specifically noted that money "damages should be recoverable only to the extent that they can be shown." 396 U.S. at 389. This Court reaffirmed that principle in *Rondeau*, 95 S.Ct. at 2079, saying that "*Mills* could not be plainer in holding that the questions of liability and relief are separate in private actions under the Securities Laws, and that the latter is to be determined according to traditional principles."

In this case, the distinction between reliance and causation of injury is vital. Even if it is conclusively presumed

that every one of the seven percent of Piper shareholders who accepted BPC's exchange offer relied on the omission, there remains the established fact that at the end of the exchange offers the contest was still open. The post-exchange offer competition, and indeed the entire control fight, were determined by BPC's superior financial resources. As Judge Mansfield noted, "it was BPC's cash purchases in the open market of 100,614 shares, as compared with CCI's capacity to buy only 29,200 shares, that won control for BPC." (A-116)

In addition to reading *Mills* and *Ute* to establish presumptions they did not establish, the Court of Appeals appears to have held that those presumptions are irrebuttable. Yet neither *Mills* nor *Ute* says anything about making any presumption irrebuttable. On this point the Court of Appeals decision conflicts with that of the Third Circuit in *Rochez Bros., Inc. v. Rhoades*, 491 F.2d 402, 410 (3rd Cir. 1974), which held that *Ute* does not preclude consideration of reliance "at all in a non-disclosure case, but only that proof of reliance is not required for recovery." The question of whether the *Mills* and *Ute* presumptions are rebuttable, when properly applied, is an open one in the lower courts. See Note, *The Reliance Requirement in Private Actions Under SEC Rule 10b-5*, 88 Harv. L. Rev. 584, 600 (1975). This case provides an opportunity for this Court to settle that issue, among the other causation issues raised.*

* The Court of Appeals also appears to have relied on *Mills* and *Ute* to link BPC's technical violation of Rule 10b-6 to CCI's injury—again ignoring the trial court's findings. Judges Gurfein and Mansfield seem to have thought that any purchase that technically violates Rule 10b-6, if needed by one aspirant to acquire a majority of the target's stock, establishes causation as a matter of law. (A-96, 111) Whether this was based on *Mills* and *Ute* is not entirely clear from their opinions. Judge Timbers spelled out his view in the main opinion in *Chris-Craft II* in more detail. Citing *Mills* and *Ute*, he held that "Rule 10b-6 creates a presumption that illegal purchases will

D. The \$36 Million Damage Award Vastly Exceeds Plaintiff's Actual Damages on Account of Petitioners' Acts and Thus Is Inconsistent with Section 28(a) of the 1934 Act and the Express Limitations of the 1933 Act.

In *Chris-Craft II*, BPC's actions were held to have denied CCI a fair opportunity to compete for control of Piper, and the Court of Appeals announced a formula to measure the damages for that injury. The opportunity for control was then valued by the District Court at about \$1.7 million. In *Chris-Craft III*, the Court of Appeals adopted a new formula and raised the award to about \$36 million (including prejudgment interest)—an amount that bears no relationship to the value of control of Piper, much less to the value of the mere opportunity to compete for control.

The Court of Appeals' latest formulation of the measure of damages is that BPC must pay to CCI "the difference between the price CCI paid for its Piper stock . . . and the price it could have obtained for it through a public offering after BPC unlawfully acquired control. . . ." (B-31) In other words, it ruled that a takeover aspirant who violates either Section 14(e) or Section 10(b) becomes an insurer of the other aspirant's pre-contest position. If, as was the case here, plaintiff paid more for the stock than it was intrinsically worth, defendant must make it whole for the difference, even though defendant did not induce the plaintiff's purchases. And if, as here, the market value of a target company's stock declines for reasons having nothing

substantially inflate the price of the security," and that a "reasonable investor is likely to rely on this inflation in deciding to accept the exchange offer." (A-66, n. 30) In addition to being unwarranted in fact, this statement stands *Mills* on its head. BPC, at most, committed a technical violation of Rule 10b-6's terms, though not its purposes. (A-148-151) BPC had urged that where the reason for the rule is inapplicable, the rule should not be applied. The Court of Appeals applied a converse canon: a person who commits any technical violation will be conclusively presumed to have contravened the purposes of the rule he violated.

to do with defendant's actions, defendant must make plaintiff whole for that decline too, even though defendant suffered the same decline on its stock in the target.

The complete divorce between what CCI was denied and the Court of Appeals' measure of damages is easily demonstrated. Even if CCI had succeeded in acquiring control of Piper, it would have suffered the same decline in the market value of its Piper holdings. CCI would have suffered the same decline in market value even if BPC had never entered the contest. Indeed, BPC, the "winner", suffered the very same "damages" the Court of Appeals ordered it to pay CCI as compensation for losing.

Section 28(a) of the 1934 Act specifically limits a plaintiff to recovery of "his actual damages on account of the act complained of." In a control contest where the "act complained of" is denial of the opportunity for control, Section 28(a) requires that plaintiff's damages be measured by the value of control and the lost opportunity to compete for it. The loss attendant on a decline in the market value of the acquired stock clearly does not constitute damage on account of the act complained of, since it falls on winner and loser alike. The Court of Appeals' damage formula thus plainly violates Section 28(a).

The *Chris-Craft III* damage formula also ignores the limits imposed by the 1933 Act, which (unlike Sections 10(b) and 14(e) of the 1934 Act) provides an explicit private remedy for an omission or misstatement in a prospectus. The 1933 Act both limits the maximum award (Section 11(g)) and permits any defendant to prove that the loss suffered by the plaintiff is due to factors other than the misstatement or omission (Section 11(e)). The damages awarded here violate both of these limitations. It is difficult to believe that Congress expressly established careful limits in the 1933 Act in order to have them ignored in judicially implied rights of action for the same violations

under the 1934 Act.* Indeed, the SEC has just said to this Court:

“The private right of action to recover damages for violation of Rule 10b-5 is a judicially created remedy, designed to further the purposes of the federal securities laws. In determining whether damages should be awarded for a particular violation of Rule 10b-5, the limitations upon damage liability that Congress imposed in those sections of the federal securities laws that expressly provide for private damage suits for violations of those laws constitute an appropriate guideline for the courts in determining the scope of the implied action under Rule 10b-5.” Brief of SEC as Amicus Curiae at 8-9 in *Ernst & Ernst v. Hochfelder*, *supra*.

The extraordinary damage formula applied below also contravenes the expressed intent of Congress in the Williams Act not to discourage tender bids or control contests. Any aspirant for control must now be prepared, if he is successful, to absorb not only his own loss should the stock of the target ultimately decline, but also, if he makes a good faith mistake, his opponent's market losses. This is a risk that can be expected to discourage rational businessman from entering such contests.

Finally, this case raises important questions concerning the relationship of money damages and equitable relief in securities cases. BPC has been enjoined for five years from voting 14% of the Piper shares, which gives CCI a majority of the voting power for this period. In addition, BPC has been required in the SEC action to offer former Piper shareholders the right to rescind the July 1969 ex-

* The anomaly of this result raises the fundamental question reserved by this Court in *Blue Chip Stamps*: whether an implied action under the 1934 Act will lie for violations subject to express civil remedies under the 1933 Act. 95 S.Ct. at 1933, n.15.

change by which BPC acquired 110,802 Piper shares. These rescission rights are assignable, and CCI could therefore obtain control of Piper through the acquisition of these rights and some additional purchases for a fraction of the \$36 million it will receive if the judgment below stands. Neither the District Court in calculating damages, nor the Court of Appeals in recalculating damages itself, considered the effect of this equitable relief against BPC on CCI's damages. Yet if the goal of damages in this case is, as it must be under Section 28(a) of the 1934 Act, to compensate CCI, not to punish BPC, surely the effect of this equitable relief must be taken into account.

E. The Court of Appeals' Decision to Calculate Damages Itself Instead of Remanding for a Hearing After It Changed Its View of the Proper Measure of Damages and Its "Affirmance" of the Award of Prejudgment Interest After Vastly Increasing the Damages Denied Petitioners Due Process of Law.

In *Chris-Craft II*, the Court of Appeals held that CCI's injury was denial of the fair opportunity to compete for control of Piper and expressly directed that:

"The measure of damages should be the reduction in the appraisal value of CCI's Piper holdings attributable to BPC's taking a majority position and reducing CCI to a minority position, and thus being able to compel a merger at any time." (A-69)

On remand, both sides presented evidence as to the reduction in appraisal value, offering the testimony of eight different experts. The District Court considered all the evidence presented, judged the credibility of each expert, made extensive findings of fact and concluded that CCI's damages were "generously valued" at \$1,673,988. (B-70)

In *Chris-Craft III*, the Court of Appeals entirely changed its theory of damages and held instead that:

“ . . . the correct formula for determining CCI’s damages is the difference between the price CCI paid for its Piper stock . . . and the price it could have obtained for it through a public offering after BPC unlawfully acquired control” (B-31)

Instead of remanding for a hearing to determine damages under the new measure, however, the Court of Appeals decided to calculate damages itself. First, it mistakenly assumed that CCI’s cost could be taken directly from CCI’s financial statements. It then assumed without argument that CCI would have had to register its Piper stock with the SEC before selling it—a questionable legal assumption.* Finally, on the basis of two paragraphs in the testimony of one witness who was not credited by the District Court, it decided that registration would take five months and that in a hypothetical public offering in January 1970, CCI could have obtained only \$27 for each of its Piper shares. On this slim reed, the Court of Appeals increased damages fifteen-fold and ordered the entry of a final judgment against BPC for \$25.8 million in damages.

By calculating damages itself on the basis of a small excerpt from a record prepared for a different purpose, the Court of Appeals prevented BPC from presenting evidence that would have shown that CCI’s damages were substantially less than \$25,793,365, even under the new theory of damages enunciated in *Chris-Craft III*. Had the Court of Appeals remanded this case to the District Court to make

* Registration would be required only if CCI were deemed a “controlling person” of Piper in spite of the fact that it lost the control contest. See Sections 2(11), 4(1) and 5 of the 1933 Act, 15 U.S.C. §§ 77b(11), 77d(1) and 77e. A recognized authority in this area has said that registration would not be required in a situation like the one here, since BPC, not CCI, had achieved control. Aranow & Einhorn, *Tender Offers for Corporate Control* 216 (1973).

the findings of fact appropriate to its new theory, BPC would have offered proof that:

(1) the date on which a sale by CCI could have occurred (a critical question of fact in a period of market decline*) was much earlier than January 1970;

(2) the price that CCI could have obtained for the shares on the date of the hypothetical sale was much greater than \$27 per share;

(3) CCI's alleged cost of \$63.98 per Piper share included interest, legal and other expenses not recoverable even under the new test; and

(4) the price of Piper stock, along with the prices of the stocks of other small-aircraft manufacturers and the market generally, declined sharply after the CCI and BPC purchases for reasons wholly unrelated to BPC's actions or to the takeover contest itself.

These facts became critical when the Court of Appeals adopted the new measure of damages because every one-dollar difference in the presumed cost or hypothetical sale price of a share of Piper stock changes the total judgment against BPC and its directors by \$1 million.

This Court has consistently insisted that litigants be given their day in court on issues raised by a reversal of a lower court's decision. *E.g.*, *Byrd v. Blue Ridge Cooperative*, 356 U.S. 525 (1958).** The Court of Appeals

* For example, the CCI witness relied on by the Court of Appeals testified that had the hypothetical sale been made in November 1969 instead of January 1970, CCI could have obtained about \$33.00 per share; using this figure would have reduced damages under the Court of Appeals' new formula by almost \$6 million including interest. (B-29, n. 22)

** As this Court said in *Byrd*, 356 U.S. at 533:

"The petitioner was fully justified in that circumstance in not coming forward with proof of his own at that stage of the proceedings, for he had nothing to meet under the District Court's view of the statute. He thus cannot be penalized by the denial of his day in court to try the issue under the correct interpretation of the statute."

justified not remanding this case to the District Court for new findings of fact on the basis of the length of time the case had already taken. (B-24) But far from serving the valid purpose of judicial economy, the Court of Appeals' decision here can only lead to a vast expansion of trial evidence submitted by litigants who cannot predict what the appellate court may deem relevant. Even more fundamentally, neither the Fifth Amendment nor the statute on which the Court of Appeals relied, 28 U.S.C. § 2106, sanctions depriving a defendant of the opportunity to present relevant evidence in his defense.

The Court of Appeals' action with respect to prejudgment interest compounded the denial of BPC's fundamental rights. The District Court had awarded prejudgment interest of approximately \$600,000. This was "affirmed" by the Court of Appeals, without remand, into an award of prejudgment interest of approximately \$10 million, after the Court of Appeals had awarded CCI vastly increased damages under the new damage formula.

This Court's only discussion of prejudgment interest in a securities case is found in *Blau v. Lehman*, 368 U.S. 403, 414 (1962), where, while affirming the denial of prejudgment interest, this Court said, quoting from *Board of Commissioners v. United States*, 308 U.S. 343, 352 (1939), that prejudgment interest "'is given in response to considerations of fairness'" and "'is denied when its exaction would be inequitable.'" Even the Court of Appeals has recognized that the amount of damages is an important factor to be weighed by the District Court in determining whether prejudgment interest would be equitable. See *Norte & Co. v. Huffines*, 416 F.2d 1189, 1191 (2d Cir. 1969), cert. denied sub nom. *Muscat v. Norte & Co.*, 397 U.S. 989 (1970). But the fifteen-fold increase in damages here, raising interest alone to about \$10 million, was held (without argument) not even to require a remand for the exercise of the trial court's discretion in view of the changed circumstances.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinions of the Court of Appeals for the Second Circuit.

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APPENDIX

Section 10(b) of the 1934 Act, 15 U.S.C. § 78j(b) provides:

“It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.”

Section 14(e) of the 1934 Act, 15 U.S.C. § 78n(e), provides:

“(e) It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.”

Section 28(a) of the 1934 Act, 15 U.S.C. § 78bb(a) provides:

“(a) The rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity; but no person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of. Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.”

Section 11 of the 1934 Act, 15 U.S.C. § 77k, provides in pertinent part:

“(b) Notwithstanding the provisions of subsection (a) of this section no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof—

• • •

“(3) that (A) as regards any part of the registration statement not purporting to be made on the authority of an expert, and not purporting to be a copy of or extract from a report or valuation of an expert, and not purporting to be made on the authority of a public official document or statement, he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a

material fact required to be stated therein or necessary to make the statements therein not misleading;

• • •

“(e) The suit authorized under subsection (a) of this section may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: *Provided*, That if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) of this section for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to

the public. In any suit under this or any other section of this subchapter the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

• • •

“(g) In no case shall the amount recoverable under this section exceed the price at which the security was offered to the public.”

Rule 10b-6 under the 1934 Act, 17 C.F.R. § 240.10b-6, provides in pertinent part:

“(a) It shall constitute a ‘manipulative or deceptive device or contrivance’ as used in section 10(b) of the act for any person, . . .

(2) Who is the issuer or other person on whose behalf such a distribution is being made . . .

directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, either alone or with one or more other persons, to bid for or purchase for any account in which he has a beneficial interest, any security which is the subject of such distribution, or any security of the same class and series, or any right to purchase any such security, or to attempt to induce any person to purchase any such security or right, until after he has completed his par-

ticipation in such distribution: *Provided, however, that this section shall not prohibit . . . (ii) unsolicited privately negotiated purchases, each involving a substantial amount of such security, effected neither on a securities exchange nor from or through a broker or dealer; . . .*

. . .

(b) The distribution of a security (1) which is immediately exchangeable for or convertible into another security, or (2) which entitles the holder thereof immediately to acquire another security, shall be deemed to include a distribution of such other security within the meaning of this section. . . .”